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13 Attorneys for Plaintiff and Counter-Defendant
 WHATSAPP INC.

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN FRANCISCO DIVISION

17
 18 WHATSAPP INC.,
 Plaintiff and
 19 Counter-Defendant,

20 v.

21 INTERCARRIER COMMUNICATIONS
 22 LLC,

23 Defendant and
 Counter-Plaintiff.

CASE NO. 3:13-CV-4272-JST

STIPULATED PROTECTIVE ORDER

Judge: Hon. Jon S. Tigar

Filing Date: April 8, 2014

Trial Date: None set

24
 25 **I. PURPOSES AND LIMITATIONS**

26 Disclosure and discovery activity in this action are likely to involve production of
 27 confidential, proprietary, or private information for which special protection from public
 28 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.

1 Accordingly, the parties hereby stipulate to and petition the court to enter the following
2 Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket
3 protections on all disclosures or responses to discovery and that the protection it affords from
4 public disclosure and use extends only to the limited information or items that are entitled to
5 confidential treatment under the applicable legal principles. The parties further acknowledge, as
6 set forth in Section XIV.D, below, that this Stipulated Protective Order does not entitle them to
7 file confidential information under seal; Civil Local Rule 79-5 and General Order 62 set forth the
8 procedures that must be followed and the standards that will be applied when a party seeks
9 permission from the court to file material under seal.

10 **II. DEFINITIONS**

11 **A. Challenging Party**

12 A Party or Non-Party that challenges the designation of information or items under this
13 Order.

14 **B. “CONFIDENTIAL” Information or Items**

15 Information (regardless of how it is generated, stored or maintained) or tangible things
16 that qualify for protection under Federal Rule of Civil Procedure 26(c).

17 **C. Outside Counsel**

18 Means outside counsel noticed in this action on behalf of WhatsApp Inc. and InterCarrier
19 Communications LLC, and administrative and paralegal staff working directly under these
20 attorneys’ supervision.

21 **D. Designated House Counsel**

22 House Counsel who seek access to “HIGHLY CONFIDENTIAL—ATTORNEYS’
23 EYES ONLY” information in this matter.

24 **E. Designating Party**

25 A Party or Non-Party that designates information or items that it produces in disclosures
26 or in responses to discovery as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL—
27 ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL—SOURCE CODE.”

28

1 **F. Disclosure or Discovery Material**

2 All items or information, regardless of the medium or manner in which it is generated,
3 stored, or maintained (including, among other things, testimony, transcripts, and tangible things),
4 that are produced or generated in disclosures or responses to discovery in this matter.

5 **G. Expert**

6 A person with specialized knowledge or experience in a matter pertinent to the litigation
7 who (1) has been retained by a Party or its counsel to serve as an expert witness or as a
8 consultant in this action, (2) is not a past or current employee of a Party or of a Party’s
9 competitor, and (3) at the time of retention, is not anticipated to become an employee of a Party
10 or of a Party’s competitor. For the purposes of this provision only, any person who has served or
11 anticipates serving a Party or a Party’s competitor only as an expert or a consultant in litigation
12 matters shall not be considered an employee, contractor, or agent of a Party or Party’s
13 competitor.

14 **H. “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” Information**
15 **or Items**

16 Extremely sensitive “Confidential Information or Items,” disclosure of which to another
17 Party or Non-Party would create a substantial risk of serious harm that could not be avoided by
18 less restrictive means.

19 **I. “HIGHLY CONFIDENTIAL—SOURCE CODE” Information or Items**

20 Extremely sensitive “Confidential Information or Items” representing computer code and
21 associated comments and revision histories, formulas, engineering specifications, or schematics
22 that define or otherwise describe in detail the algorithms or structure of software or hardware
23 designs, disclosure of which to another Party or Non-Party would create a substantial risk of
24 serious harm that could not be avoided by less restrictive means.

25 **J. House Counsel**

26 Attorneys who are employees of a Party to this action. House Counsel does not include
27 Outside Counsel of Record or any other outside counsel.

28

1 **K. Non-Party**

2 Any natural person, partnership, corporation, association, or other legal entity not named
3 as a Party to this action.

4 **L. Outside Counsel of Record**

5 Attorneys who are not employees of a Party to this action but are retained to represent or
6 advise a Party to this action and have appeared in this action on behalf of that Party or are
7 affiliated with a law firm which has appeared on behalf of that Party.

8 **M. Party**

9 Any party to this action, including all of its officers, directors, employees, consultants,
10 retained experts, and Outside Counsel of Record (and their support staffs).

11 **N. Producing Party**

12 A Party or Non-Party that produces Disclosure or Discovery Material in this action.

13 **O. Professional Vendors**

14 Persons or entities that provide litigation support services (e.g., photocopying,
15 videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or
16 retrieving data in any form or medium) and their employees and subcontractors.

17 **P. Protected Material**

18 Any Disclosure or Discovery Material that is designated as “CONFIDENTIAL,”
19 “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or “HIGHLY
20 CONFIDENTIAL—SOURCE CODE.”

21 **Q. Receiving Party**

22 A Party that receives Disclosure or Discovery Material from a Producing Party.

23 **III. SCOPE**

24 The protections conferred by this Stipulation and Order cover not only Protected Material
25 (as defined above), but also (1) any information copied or extracted from Protected Material; (2)
26 all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,
27 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.

28 However, the protections conferred by this Stipulation and Order do not cover the following

1 information: (a) any information that is in the public domain at the time of disclosure to a
2 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as
3 a result of publication not involving a violation of this Order, including becoming part of the
4 public record through trial or otherwise; and (b) any information known to the Receiving Party
5 prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who
6 obtained the information lawfully and under no obligation of confidentiality to the Designating
7 Party. Further, notwithstanding the foregoing, no provision of this Stipulation and Order will
8 prevent Outside Counsel from maintaining copies of its written work product in accordance with
9 its normal procedures to store and protect the confidentiality of this work product, even if this
10 work product references or excerpts Protected Material. Any use of Protected Material at trial
11 shall be governed by a separate agreement or order.

12 **IV. DURATION**

13 Even after final disposition of this litigation, the confidentiality obligations imposed by
14 this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court
15 order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all
16 claims and defenses in this action, with or without prejudice; and (2) final judgment herein after
17 the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this
18 action, including the time limits for filing any motions or applications for extension of time
19 pursuant to applicable law.

20 **V. DESIGNATING PROTECTED MATERIAL**

21 **A. Exercise of Restraint and Care in Designating Material for Protection**

22 Each Party or Non-Party that designates information or items for protection under this
23 Order must take care to limit any such designation to specific material that qualifies under the
24 appropriate standards. To the extent it is practical to do so, the Designating Party must designate
25 for protection only those parts of material, documents, items, or oral or written communications
26 that qualify—so that other portions of the material, documents, items, or communications for
27 which protection is not warranted are not swept unjustifiably within the ambit of this Order.

28 Mass, indiscriminate, or routinized designations are prohibited. Designations that are

1 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
2 unnecessarily encumber or retard the case development process or to impose unnecessary
3 expenses and burdens on other parties) expose the Designating Party to sanctions.

4 If it comes to a Designating Party's attention that information or items that it designated
5 for protection do not qualify for protection at all or do not qualify for the level of protection
6 initially asserted, that Designating Party must promptly notify all other Parties that it is
7 withdrawing the mistaken designation.

8 **B. Manner and Timing of Designations**

9 Except as otherwise provided in this Order (see, e.g., second paragraph of section V.B(a)
10 below), or as otherwise stipulated or ordered, Disclosure or Discovery Material that qualifies for
11 protection under this Order must be clearly so designated before the material is disclosed or
12 produced.

13 Designation in conformity with this Order requires:

14 (a) for information in documentary form (e.g., paper or electronic documents, but
15 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
16 Party affix the legend "CONFIDENTIAL," "HIGHLY CONFIDENTIAL—ATTORNEYS'
17 EYES ONLY," or "HIGHLY CONFIDENTIAL—SOURCE CODE" to each page that contains
18 protected material. If only a portion or portions of the material on a page qualifies for protection,
19 the Producing Party also must clearly identify the protected portion(s) (e.g., by making
20 appropriate markings in the margins) and must specify, for each portion, the level of protection
21 being asserted.

22 A Party or Non-Party that makes original documents or materials available for inspection
23 need not designate them for protection until after the inspecting Party has indicated which
24 material it would like copied and produced. During the inspection and before the designation, all
25 of the material made available for inspection shall be deemed "HIGHLY CONFIDENTIAL—
26 ATTORNEYS' EYES ONLY." After the inspecting Party has identified the documents it wants
27 copied and produced, the Producing Party must determine which documents, or portions thereof,
28 qualify for protection under this Order. Then, before producing the specified documents, the

1 Producing Party must affix the appropriate legend (“CONFIDENTIAL,” “HIGHLY
2 CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL—
3 SOURCE CODE”) to each page that contains Protected Material. If only a portion or portions of
4 the material on a page qualifies for protection, the Producing Party also must clearly identify the
5 protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for
6 each portion, the level of protection being asserted.

7 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the
8 Designating Party identify on the record, before the close of the deposition, hearing, or other
9 proceeding, all protected testimony and specify the level of protection being asserted. When it is
10 impractical to identify separately each portion of testimony that is entitled to protection and it
11 appears that substantial portions of the testimony may qualify for protection, the Designating
12 Party may invoke on the record (before the deposition, hearing, or other proceeding is
13 concluded) a right to have up to 21 days to identify the specific portions of the testimony as to
14 which protection is sought and to specify the level of protection being asserted. Only those
15 portions of the testimony that are appropriately designated for protection within the 21 days shall
16 be covered by the provisions of this Stipulated Protective Order. Alternatively, a Designating
17 Party may specify, at the deposition or up to 21 days afterwards if that period is properly
18 invoked, that the entire transcript shall be treated as “CONFIDENTIAL” or “HIGHLY
19 CONFIDENTIAL—ATTORNEYS’ EYES ONLY.”

20 Parties shall give the other parties notice if they reasonably expect a deposition, hearing,
21 or other proceeding to include Protected Material so that the other parties can ensure that only
22 authorized individuals who have signed the “Acknowledgment and Agreement to Be Bound”
23 (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a deposition
24 shall not in any way affect its designation as “CONFIDENTIAL” or “HIGHLY
25 CONFIDENTIAL—ATTORNEYS’ EYES ONLY.”

26 Transcripts containing Protected Material shall have an obvious legend on the title page
27 that the transcript contains Protected Material, and the title page shall be followed by a list of all
28 pages (including line numbers as appropriate) that have been designated as Protected Material

1 and the level of protection being asserted by the Designating Party. The Designating Party shall
2 inform the court reporter of these requirements. Any transcript that is prepared before the
3 expiration of a 21-day period for designation shall be treated during that period as if it had been
4 designated “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” in its entirety unless
5 otherwise agreed. After the expiration of that period, the transcript shall be treated only as
6 actually designated.

7 (c) for information produced in some form other than documentary and for any other
8 tangible items, that the Producing Party affix in a prominent place on the exterior of the
9 container or containers in which the information or item is stored the legend
10 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or
11 “HIGHLY CONFIDENTIAL—SOURCE CODE.” If only a portion or portions of the
12 information or item warrant protection, the Producing Party, to the extent practicable, shall
13 identify the protected portion(s) and specify the level of protection being asserted.

14 **C. Inadvertent Failures to Designate**

15 If timely corrected, an inadvertent failure to designate qualified information or items does
16 not, standing alone, waive the Designating Party’s right to secure protection under this Order for
17 such material. Upon timely correction of a designation, the Receiving Party must make
18 reasonable efforts to assure that the material is treated in accordance with the provisions of this
19 Order.

20 **VI. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

21 **A. Timing of Challenges**

22 Any Party or Non-Party may challenge a designation of confidentiality at any time.
23 Unless a prompt challenge to a Designating Party’s confidentiality designation is necessary to
24 avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant
25 disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality
26 designation by electing not to mount a challenge promptly after the original designation is
27 disclosed.

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1 **B. Meet and Confer**

2 The Challenging Party shall initiate the dispute resolution process by providing written
3 notice of each designation it is challenging and describing the basis for each challenge. To avoid
4 ambiguity as to whether a challenge has been made, the written notice must recite that the
5 challenge to confidentiality is being made in accordance with this specific paragraph of the
6 Protective Order. The parties shall attempt to resolve each challenge in good faith and must
7 begin the process by conferring directly (in voice to voice dialogue; other forms of
8 communication are not sufficient) within 14 days of the date of service of notice. In conferring,
9 the Challenging Party must explain the basis for its belief that the confidentiality designation was
10 not proper and must give the Designating Party an opportunity to review the designated material,
11 to reconsider the circumstances, and, if no change in designation is offered, to explain the basis
12 for the chosen designation. A Challenging Party may proceed to the next stage of the challenge
13 process only if it has engaged in this meet and confer process first or establishes that the
14 Designating Party is unwilling to participate in the meet and confer process in a timely manner.

15 **C. Judicial Intervention**

16 If the Parties cannot resolve a challenge without court intervention, the Designating Party
17 shall file and serve a motion to retain confidentiality under Civil Local Rule 7 (and in
18 compliance with Civil Local Rule 79-5, if applicable) within 21 days of the initial notice of
19 challenge or within 14 days of the parties agreeing that the meet and confer process will not
20 resolve their dispute, whichever is earlier. Each such motion must be accompanied by a
21 competent declaration affirming that the movant has complied with the meet and confer
22 requirements imposed in the preceding paragraph. Failure by the Designating Party to make
23 such a motion including the required declaration within 21 days (or 14 days, if applicable) shall
24 automatically waive the confidentiality designation for each challenged designation. In addition,
25 the Challenging Party may file a motion challenging a confidentiality designation at any time if
26 there is good cause for doing so, including a challenge to the designation of a deposition
27 transcript or any portions thereof. Any motion brought pursuant to this provision must be
28 accompanied by a competent declaration affirming that the movant has complied with the meet

1 and confer requirements imposed by the preceding paragraph.

2 The burden of persuasion in any such challenge proceeding shall be on the Designating
3 Party. Frivolous challenges and those made for an improper purpose (e.g., to harass or impose
4 unnecessary expenses and burdens on other parties) may expose the Challenging Party to
5 sanctions. Unless the Designating Party has waived the confidentiality designation by failing to
6 file a motion to retain confidentiality as described above, all parties shall continue to afford the
7 material in question the level of protection to which it is entitled under the Producing Party’s
8 designation until the court rules on the challenge.

9 **VII. ACCESS TO AND USE OF PROTECTED MATERIAL**

10 **A. Basic Principles**

11 A Receiving Party may use Protected Material that is disclosed or produced by another
12 Party or by a Non-Party in connection with this case only for prosecuting, defending, or
13 attempting to settle this litigation. Such Protected Material may be disclosed only to the
14 categories of persons and under the conditions described in this Order. When the litigation has
15 been terminated, a Receiving Party must comply with the provisions of section XV below
16 (FINAL DISPOSITION).

17 Protected Material must be stored and maintained by a Receiving Party at a location and
18 in a secure manner that ensures that access is limited to the persons authorized under this Order.

19 **B. Disclosure of “CONFIDENTIAL” Information or Items**

20 Unless otherwise ordered by the court or permitted in writing by the Designating Party, a
21 Receiving Party may disclose any information or item designated “CONFIDENTIAL” only to:

22 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as employees
23 of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information
24 for this litigation;

25 (b) Experts (as defined in this Order) of the Receiving Party (1) to whom disclosure is
26 reasonably necessary for this litigation, (2) who have signed the “Acknowledgment and
27 Agreement to Be Bound” (Exhibit A), and (3) as to whom the procedures set forth in Paragraph
28 VII.D(a), below, have been followed;

- 1 (c) the court and its personnel;
- 2 (d) court reporters and their staff, professional jury or trial consultants, and Professional
- 3 Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the
- 4 “Acknowledgment and Agreement to Be Bound” (Exhibit A);
- 5 (e) during their depositions, witnesses in the action to whom disclosure is reasonably
- 6 necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit
- 7 A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of
- 8 transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be
- 9 separately bound by the court reporter and may not be disclosed to anyone except as permitted
- 10 under this Stipulated Protective Order;
- 11 (f) the author or recipient of a document containing the information or a custodian or
- 12 other person who otherwise possessed or knew the information;
- 13 (g) one (1) Designated House Counsel of the Receiving Party to whom disclosure is
- 14 reasonably necessary for this litigation.

15 **C. Disclosure of “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY”**

16 **and “HIGHLY CONFIDENTIAL—SOURCE CODE” Information or Items**

17 Unless otherwise ordered by the court or permitted in writing by the Designating Party, a

18 Receiving Party may disclose any information or item designated “HIGHLY

19 CONFIDENTIAL—ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE

20 CODE” only to those persons identified above in Paragraphs VII.B(a) through VII.B(f), and

21 subject to provisions of Paragraph VII.D below.

22 **D. Procedures for Approving or Objecting to Disclosure of “HIGHLY**

23 **CONFIDENTIAL—ATTORNEYS’ EYES ONLY” or “HIGHLY**

24 **CONFIDENTIAL—SOURCE CODE” Information to Experts**

25 (a) Unless otherwise ordered by the court or agreed to in writing by the Designating

26 Party, a Party that seeks to disclose to an Expert (as defined in this Order) any information or

27 item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or

28 “HIGHLY CONFIDENTIAL—SOURCE CODE” pursuant to paragraph VII.C(c) first must

1 make a written request to the Designating Party that (1) identifies the general categories of
2 “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” or “HIGHLY
3 CONFIDENTIAL—SOURCE CODE” information that the Receiving Party seeks permission to
4 disclose to the Expert, (2) sets forth the full name of the Expert and the city and state of his or
5 her primary residence, (3) attaches a copy of the Expert’s current resume, (4) identifies the
6 Expert’s current employer(s), (5) identifies each person or entity from whom the Expert has
7 received compensation or funding for work in his or her areas of expertise or to whom the expert
8 has provided professional services, including in connection with a litigation, at any time during
9 the preceding five years,¹ and (6) identifies (by name and number of the case, filing date, and
10 location of court) any litigation in connection with which the Expert has offered expert
11 testimony, including through a declaration, report, or testimony at a deposition or trial, during the
12 preceding five years.

13 (b) A Party that makes a request and provides the information specified in the preceding
14 respective paragraphs may disclose the subject Protected Material to the identified Expert unless,
15 within 14 days of delivering the request, the Party receives a written objection from the
16 Designating Party. Any such objection must set forth in detail the grounds on which it is based.

17 (c) A Party that receives a timely written objection must meet and confer with the
18 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by
19 agreement within seven days of the written objection. If no agreement is reached, the Party
20 seeking to make the disclosure to the Expert may file a motion as provided in Civil Local Rule 7
21 (and in compliance with Civil Local Rule 79-5 and General Order 62, if applicable) seeking
22 permission from the court to do so. Any such motion must describe the circumstances with
23 specificity, set forth in detail the reasons why disclosure to the Expert is reasonably necessary,
24 assess the risk of harm that the disclosure would entail, and suggest any additional means that

25 _____
26 ¹ If the Expert believes any of this information is subject to a confidentiality obligation to a
27 third-party, then the Expert should provide whatever information the Expert believes can be
28 disclosed without violating any confidentiality agreements, and the Party seeking to disclose
to the Expert shall be available to meet and confer with the Designating Party regarding any
such engagement.

1 could be used to reduce that risk. In addition, any such motion must be accompanied by a
2 competent declaration describing the parties' efforts to resolve the matter by agreement (i.e., the
3 extent and the content of the meet and confer discussions) and setting forth the reasons advanced
4 by the Designating Party for its refusal to approve the disclosure.

5 In any such proceeding, the Party opposing disclosure to the Expert shall bear the burden
6 of proving that the risk of harm that the disclosure would entail (under the safeguards proposed)
7 outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

8 **VIII. PROSECUTION BAR**

9 Absent written consent from the Producing Party, any individual who receives access to
10 any technical material designated as "HIGHLY CONFIDENTIAL—ATTORNEYS' EYES
11 ONLY" or "HIGHLY CONFIDENTIAL—SOURCE CODE" information shall not be involved
12 in the prosecution of patents or patent applications relating to messaging services, applications,
13 processes, systems and components thereof before any foreign or domestic agency, including the
14 United States Patent and Trademark Office ("the Patent Office"). For purposes of this
15 paragraph, "prosecution" includes directly or indirectly drafting, amending, advising, or
16 otherwise affecting the scope or maintenance of patent claims.² This Prosecution Bar shall
17 begin when access to technical material designated as "HIGHLY CONFIDENTIAL—
18 ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL—SOURCE CODE"
19 information is first received by the affected individual and shall end two (2) years after final
20 termination of this action.

21 **IX. SOURCE CODE**

22 (a) To the extent production of source code becomes necessary in this case, a Producing
23 Party may designate source code as "HIGHLY CONFIDENTIAL—SOURCE CODE" if it
24 comprises or includes confidential, proprietary or trade secret source code.

25 (b) Protected Material designated as "HIGHLY CONFIDENTIAL—SOURCE CODE"

26 ² Prosecution includes, for example, original prosecution, reissue and reexamination
27 proceedings, post-issuance proceedings before a domestic or foreign agency or Patent Office,
28 including, but not limited to, a post-grant review, covered business method review, and *inter partes* review.

1 shall be subject to all of the protections afforded to “HIGHLY CONFIDENTIAL—
2 ATTORNEYS’ EYES ONLY” information, including the Prosecution Bar set forth in Paragraph
3 VII, and may be disclosed only to the individuals to whom “HIGHLY CONFIDENTIAL—
4 ATTORNEYS’ EYES ONLY” information may be disclosed, as set forth in Paragraphs VII.C
5 and VII.D, with the exception of Designated House Counsel.

6 (c) Any source code produced in discovery shall be made available for inspection, in a
7 format allowing it to be reasonably reviewed and searched, during normal business hours or at
8 other mutually agreeable times, at an office of the Producing Party’s counsel or another mutually
9 agreed upon location. The source code shall be made available for inspection on a secured
10 computer that is not networked, has no Internet connection, and for which all ports, software, and
11 other avenues that could be used to copy or transfer such data have been blocked (“Standalone
12 Computer”) which computer will be located in a secured room without Internet access or
13 network access to other computers, and the Receiving Party shall not copy, remove, or otherwise
14 transfer any portion of the source code onto any recordable media or recordable device. The
15 Producing Party may visually monitor the activities of the Receiving Party’s representatives
16 during any source code review, but only to ensure that there is no unauthorized recording,
17 copying, or transmission of the source code.

18 (d) Access to the Standalone Computer shall be permitted, after notice to the
19 Producing Party and an opportunity to object, to up to two (2) Outside Counsel representing the
20 receiving party and up to two (2) Experts retained by the Receiving Party who have been
21 approved as set forth in Paragraphs VII.C and VII.D of this Protective Order. The Producing
22 Party’s counsel shall ensure that only these persons authorized pursuant to this paragraph shall
23 have access to a Standalone Computer. Moreover, the following additional restrictions shall
24 apply to such access:

- 25 i. Each time a person accesses a Standalone Computer, the person shall sign
26 a sign-in sheet before, and a sign-out sheet subsequent to, accessing the
27 Standalone Computer. Such sheets shall include the name of the person
28 accessing and the date and time in and out. Such sheets shall be

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maintained by the Producing Party’s counsel, and such sheets and any information on them shall be inadmissible in this action except in connection with proceedings before the Court regarding any alleged violations of this Order.

- ii. No computers, tablets, smartphones, blackberries, photographic or videorecording devices, or any recording media itself (including but not limited to camera phones, cameras, video recorders, portable hard drives, and/or USB flash drives) are permitted in an office containing a Standalone Computer.
- iii. After reasonable notice to the Producing Party as to the time and date of desired access to a Standalone Computer, the Producing Party shall make its Standalone Computer available during regular business hours at a mutually agreeable time.
- iv. The Producing Party may visually monitor the activities of the Receiving Party’s representatives during any Source Code review, but only to ensure that no unauthorized electronic records of the Source Code are being created or transmitted in any way. Any observer used by the Producing Party shall be a reasonable distance away from the Receiving Party’s representatives during the Source Code review so as to refrain from overhearing a whispered conversation (in order that the Receiving Party’s representatives can quietly discuss the Source Code in the course of their review).
- v. Unless otherwise agreed in advance by the parties in writing, the Receiving Party’s Outside Counsel and/or Experts shall remove all notes, documents, and all other materials from the room that may contain work product and/or attorney-client privileged information at the end of each day. Materials inadvertently left in the source code review room do not operate as a waiver of the attorney work product doctrine or any other

1 applicable privilege and shall be returned to the owner promptly. The
2 Producing Party shall not be responsible for any items left in the source
3 code review room.

4 (e) At the request and sole expense of the party seeking discovery, the Producing
5 Party shall permit authorized persons to use software tools of their choosing for searching,
6 inspecting, and/or analyzing the “HIGHLY CONFIDENTIAL—SOURCE CODE” materials on
7 the Standalone Computer. Specifically, before viewing these materials on a Standalone
8 Computer, the Receiving Party shall notify the Producing Party of the specific software tools
9 desired to be used, and provide such software tools to counsel for the Producing Party. Unless
10 the Producing Party objects to such software tools within two (2) business days of receipt of such
11 notice, the Producing Party shall load such software tools on the Standalone Computer upon
12 provision of such software tools by the Receiving Party. If an authorized person from the
13 Receiving Party is viewing these materials on a Standalone Computer and wishes to use
14 additional software tools for searching, inspecting, and/or analyzing such material, the Receiving
15 Party shall notify the Producing Party or Non-Party of such additional software tools and provide
16 such software tools to the Producing Party or Non-Party, and the Producing Party or Non-Party
17 shall use its best efforts to load such software tools as soon as practical thereafter.

18 (f) The Producing Party shall provide a list in both printed and electronic form that
19 contains the name and location of every file available for inspection on the computer.

20 (g) At Receiving Party’s request, the Producing Party or Non-Party shall provide to
21 the Receiving Party or Non-Party the identity of programming languages used to develop or edit
22 these materials, and whether these materials were developed or edited in a UNIX, Windows,
23 Apple and/or OS/X environment.

24 (f) The Receiving Party may request reasonable portions of the Producing Party’s Source
25 Code be printed to paper copies, but no more than thirty (30) consecutive pages and no more
26 than 10% of any specific software release, by identifying such portions to the Receiving Party.
27 The Receiving Party shall not request printed copies of the Source Code in order to review
28 blocks of Source Code elsewhere in the first instance, i.e., as an alternative to reviewing that

1 Source Code electronically on the Standalone Computer, as the parties acknowledge and agree
2 that the purpose of the protections herein would be frustrated by printing portions of code for
3 review and analysis elsewhere, and that the Producing Party shall be required to print Source
4 Code only when absolutely and directly necessary to prepare court filings or pleadings, or other
5 papers (including formal infringement contentions and a testifying expert's expert report).
6 Within seven (7) business days of a request, the Producing Party shall either (i) produce one
7 copy set of the requested pages to the Receiving Party; or (ii) inform the Requesting Party that it
8 objects to the request as excessive or not submitted for a permitted purpose. If, after meeting and
9 conferring, the Producing Party and the Receiving Party cannot resolve the objection, the
10 Receiving Party shall be entitled to seek a Court resolution of whether the request is narrowly
11 tailored and for a permitted purpose. The Producing Party will affix the proper Bates labeling
12 and confidentiality designation to any printed copies to be produced to the Receiving Party. The
13 Receiving Party's outside counsel of record and any person receiving a copy of any Source Code
14 shall maintain and store any paper copies of the Source Code at their offices in a manner that
15 prevents duplication of or unauthorized access to the Source Code, including, without limitation,
16 storing the Source Code in a locked room or cabinet at all times when it is not in active use.

17 (h) The Receiving Party's outside counsel of record may make no more than three (3)
18 additional paper copies of any portions of the Source Code received from a Producing Party
19 pursuant to Paragraph IX(f) above, not including copies attached to court filings, and shall
20 maintain a log of all paper copies of the Source Code. The log shall include the names of the
21 reviewers and/or recipients of paper copies and locations where the paper copies are stored.
22 Upon seven (7) business day's advance notice to the Receiving Party by the Producing Party, the
23 Receiving Party shall provide a copy of this log to the Producing Party.

24 (i) For depositions, copies of Source Code that are marked as deposition exhibits
25 shall not be provided to the Court Reporter or attached to deposition transcripts; rather, the
26 deposition record will identify the exhibit by its production numbers. All paper copies of Source
27 Code brought to the deposition shall be securely destroyed in a timely manner following the
28 deposition.

1 (i) Except as provided in this paragraph, absent express written permission from the
2 Producing Party, the Receiving Party may not create electronic images, or any other images, or
3 make electronic copies, of the Source Code from any paper copy of Source Code for use in any
4 manner (including by way of example only, the receiving party may not scan the Source Code to
5 a PDF or photograph the code). Images or copies of Source Code shall not be included in
6 correspondence between the parties (references to production numbers shall be used instead),
7 and shall be omitted from pleadings and other papers whenever possible. If a party reasonably
8 believes that it needs to submit a portion of Source Code as part of a filing with the Court, the
9 parties shall meet and confer as to how to make such a filing while protecting the confidentiality
10 of the Source Code and such filing will not be made absent (i) agreement from the Producing
11 Party that the confidentiality protections will be adequate, or (ii) Court order. If a Producing
12 Party agrees to produce an electronic copy of all or any portion of its Source Code or provide
13 written permission to the Receiving Party that an electronic or any other copy needs to be made
14 for a Court filing, the Receiving Party's communication and/or disclosure of electronic files or
15 other materials containing any portion of Source Code (paper or electronic) shall at all times be
16 limited solely to individuals who are expressly authorized to view Source Code under the
17 provisions of this Order. Where the Producing Party has provided the express written permission
18 required under this provision for a Receiving Party to create electronic copies of Source Code,
19 the Receiving Party shall maintain a log of all such electronic copies of any portion of Source
20 Code in its possession or in the possession of its retained consultants, including the names of the
21 reviewers and/or recipients of any such electronic copies, and the locations where the electronic
22 copies are stored. Additionally, any such electronic copies must be labeled "HIGHLY
23 CONFIDENTIAL—SOURCE CODE" as provided for in this Order.

24 (k) Nothing in this Order shall obligate the parties to produce any source code or
25 particular portion thereof, and this Order is not an act or admission that any portion of a
26 Producing Party's source code is discoverable or relevant to any issues in this action.

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1 **X. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN**
2 **OTHER LITIGATION**

3 If a Party is served with a subpoena or a court order issued in other litigation that compels
4 disclosure of any information or items designated in this action as “CONFIDENTIAL,”
5 “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or “HIGHLY
6 CONFIDENTIAL—SOURCE CODE,” that Party must:

7 (a) promptly and in no event more than ten (10) business days after receiving the
8 subpoena or order notify in writing the Designating Party. Such notification shall include a copy
9 of the subpoena or court order;

10 (b) promptly notify in writing the party who caused the subpoena or order to issue in the
11 other litigation that some or all of the material covered by the subpoena or order is subject to this
12 Protective Order. Such notification shall include a copy of this Stipulated Protective Order; and

13 (c) cooperate with respect to all reasonable procedures sought to be pursued by the
14 Designating Party whose Protected Material may be affected.³

15 If the Designating Party timely seeks a protective order, the Party served with the
16 subpoena or court order shall not produce any information designated in this action as
17 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or
18 “HIGHLY CONFIDENTIAL—SOURCE CODE” before a determination by the court from
19 which the subpoena or order issued, unless the Party has obtained the Designating Party’s
20 permission. The Designating Party shall bear the burden and expense of seeking protection in
21 that court of its confidential material—and nothing in these provisions should be construed as
22 authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from
23 another court.

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27 ³ The purpose of imposing these duties is to alert the interested parties to the existence of this
28 Protective Order and to afford the Designating Party in this case an opportunity to try to
protect its confidentiality interests in the court from which the subpoena or order issued.

1 **XI. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN**
2 **THIS LITIGATION**

3 (a) The terms of this Order are applicable to information produced by a Non-Party in this
4 action, provided that the Non-Party agrees in writing to be bound by the terms of this Order.
5 Such information produced by Non-Parties in connection with this litigation is protected by the
6 remedies and relief provided by this Order. Nothing in these provisions should be construed as
7 prohibiting a Non-Party from seeking additional protections.

8 (b) In the event that a Party is required, by a valid discovery request, to produce a Non-
9 Party’s confidential information in its possession, and the Party is subject to an agreement with
10 the Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

11 1. promptly notify in writing the Requesting Party and the Non-Party that
12 some or all of the information requested is subject to a confidentiality agreement with a Non-
13 Party;

14 2. promptly provide the Non-Party with a copy of the Stipulated Protective
15 Order in this litigation, the relevant discovery request(s), and a reasonably specific description of
16 the information requested; and

17 3. make the information requested available for inspection by the Non-Party.

18 (c) If the Non-Party fails to object or seek a protective order from this court within 14
19 days of receiving the notice and accompanying information, the Receiving Party may produce
20 the Non-Party’s confidential information responsive to the discovery request. If the Non-Party
21 timely seeks a protective order, the Receiving Party shall not produce any information in its
22 possession or control that is subject to the confidentiality agreement with the Non-Party before a
23 determination by the court.⁴ Absent a court order to the contrary, the Non-Party shall bear the
24 burden and expense of seeking protection in this court of its Protected Material.

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27 ⁴ The purpose of this provision is to alert the interested parties to the existence of
28 confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to protect its
confidentiality interests in this court.

1 **XII. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

2 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
3 Material to any person or in any circumstance not authorized under this Stipulated Protective
4 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the
5 unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the
6 Protected Material, (c) inform the person or persons to whom unauthorized disclosures were
7 made of all the terms of this Order, and (d) request such person or persons to execute the
8 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.
9 Compliance with the foregoing shall not prevent a party from seeking further relief from the
10 Court.

11 **XIII. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**
12 **PROTECTED MATERIAL**

13 When a Producing Party gives notice to Receiving Parties that certain inadvertently
14 produced material is subject to a claim of privilege or other protection, the obligations of the
15 Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B):

16 If information produced in discovery is subject to a claim of privilege or of
17 protection as trial-preparation material, the party making the claim may notify any
18 party that received the information of the claim and the basis for it. After being
19 notified, a party must promptly return, sequester, or destroy the specified
20 information and any copies it has; must not use or disclose the information until
21 the claim is resolved; must take reasonable steps to retrieve the information if the
22 party disclosed it before being notified; and may promptly present the information
23 to the court under seal for a determination of the claim. The producing party must
24 preserve the information until the claim is resolved.

25 Fed. R. Civ. P. 26(b)(5)(B).

26 If the Parties cannot resolve a claim of privilege or other protection without court
27 intervention, the Receiving Party shall present the information to the court under seal for a
28 determination of the claim within 21 days of the initial claim of privilege or other protection or

1 within 14 days of the parties agreeing that the meet and confer process will not resolve their
2 dispute, whichever is earlier.

3 Production or disclosure of documents, things, or information subject to the attorney-
4 client privilege, work product immunity, or any other applicable privilege or immunity shall
5 neither waive nor prejudice any claim that such or related material is privileged or protected by
6 any applicable privilege or immunity, provided the Producing Party notifies the Receiving Party
7 in writing promptly after discovering such production.

8 This provision is not intended to modify whatever procedure may be established in an e-
9 discovery order that provides for production without prior privilege review.

10 **XIV. MISCELLANEOUS**

11 **A. Right to Further Relief**

12 Nothing in this Order abridges the right of any person to seek its modification by the
13 Court in the future.

14 **B. Right to Assert Other Objections**

15 By stipulating to the entry of this Protective Order no Party waives any right it otherwise
16 would have to object to disclosing or producing any information or item on any ground not
17 addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on
18 any ground to use in evidence of any of the material covered by this Protective Order.

19 **C. Export Control**

20 Disclosure of Protected Material shall be subject to all applicable laws and regulations
21 relating to the export of technical data contained in such Protected Material, including the release
22 of such technical data to foreign persons or nationals in the United States or elsewhere. The
23 Producing Party shall be responsible for identifying any such controlled technical data, and the
24 Receiving Party shall take measures necessary to ensure compliance.

25 **D. Filing Protected Material**

26 Without written permission from the Designating Party or a court order secured after
27 appropriate notice to all interested persons, a Party may not file in the public record in this action
28 any Protected Material. A Party that seeks to file under seal any Protected Material must comply

1 with Civil Local Rule 79-5 and General Order 62. Protected Material may only be filed under
2 seal pursuant to a court order authorizing the sealing of the specific Protected Material at issue.
3 Pursuant to Civil Local Rule 79-5 and General Order 62, a sealing order will issue only upon a
4 request establishing that the Protected Material at issue is privileged, protectable as a trade
5 secret, or otherwise entitled to protection under the law. If a Receiving Party's request to file
6 Protected Material under seal pursuant to Civil Local Rule 79-5 and General Order 62 is denied
7 by the court, then the Receiving Party may file the Protected Material in the public record
8 pursuant to Civil Local Rule 79-5(e) unless otherwise instructed by the court.

9 **E. Other Rights and Obligations**

10 (a) The Parties acknowledge and agree that they will direct their Outside Counsel not to
11 disclose or use the Protected Material except as permitted by this Stipulation and Order.

12 (b) The Parties agree that any violation of this Order or other unauthorized disclosure of
13 Protected Material would result in irreparable harm to the Parties, entitling the Parties to
14 equitable relief necessary and appropriate to prevent the violation of this Order or the disclosure
15 of the Party's Protected Materials.

16 (c) The Parties further agree that this Order and any sanctions for violations of the terms
17 of this Order available pursuant to the Court's rules, shall not limit, affect or otherwise impair the
18 rights of the Parties to exercise any statutory or common law remedies available to the Parties for
19 violations of the terms of this Order.

20 **XV. FINAL DISPOSITION**

21 Unless otherwise ordered by this Court or agreed in writing by the Parties, within 60 days
22 after the final disposition of this action, as defined in paragraph 4, each Receiving Party shall use
23 reasonable efforts to either return all Protected Material and copies thereof to the Producing
24 Party or destroy such material. The Receiving Party's reasonable efforts shall not require the
25 return or destruction of Protected Material that (i) is stored on backup storage media made in
26 accordance with regular data backup procedures for disaster recovery purposes, (ii) is located in
27 the email archive system or archived electronic files of departed employees, or (iii) is subject to
28 legal hold obligations. Backup storage media will not be restored for purposes of returning or

1 certifying destruction of Protected Material, but such retained information shall continue to be
2 treated in accordance with this Order.

3 As used in this subdivision, “all Protected Material” includes all copies, abstracts,
4 compilations, summaries, and any other format reproducing or capturing any of the Protected
5 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must
6 submit a written certification to the Producing Party (and, if not the same person or entity, to the
7 Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all
8 the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has
9 not retained any copies, abstracts, compilations, summaries or any other format reproducing or
10 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to
11 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,
12 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work
13 product, and consultant and expert work product, even if such materials contain Protected
14 Material. Any such archival copies that contain or constitute Protected Material remain subject
15 to this Protective Order as set forth in Section IV (DURATION). Nothing in this section shall be
16 interpreted in a manner that would violate any applicable canons of ethics or codes of
17 professional responsibility.

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1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

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3 Dated: April 8, 2014

By: /s/ Richard G. Frenkel

Richard G. Frenkel
Counsel for WhatsApp Inc.

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6 Dated: April 8, 2014

By: /s/ Timothy Devlin

Timothy Devlin
Counsel for Intercarrier Communications LLC

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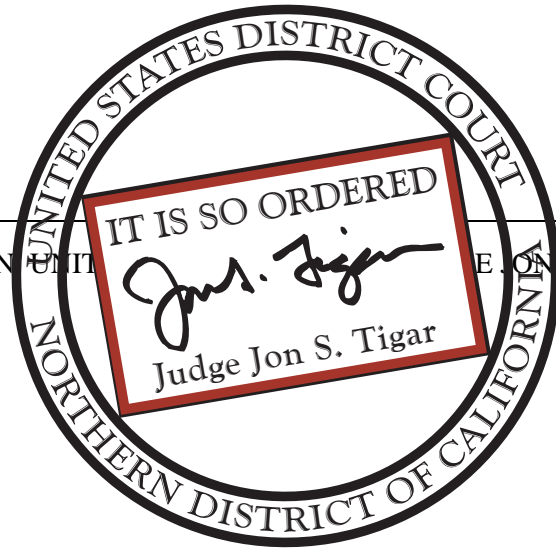
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9 IT IS SO ORDERED.

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11 Dated: April 10, 2014

HONORABLE JUDGE JON S. TIGAR



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EXHIBIT A: ACKNOWLEDGEMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____
[print or type full address], declare under penalty of perjury that I have read in its entirety and
understand the Stipulated Protective Order that was issued by the United States District Court for
the Northern District of California on _____ in the case of *WhatsApp Inc. v.*
Intercarrier Communications LLC, Case No. 5:13-CV-4272-JST (N.D. Cal). I agree to comply
with and to be bound by all the terms of this Stipulated Protective Order and I understand and
acknowledge that failure to so comply could expose me to sanctions and punishment in the
nature of contempt. I solemnly promise that I will not disclose in any manner any information or
item that is subject to this Stipulated Protective Order to any person or entity except in strict
compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Northern District of California for the purpose of enforcing the terms of this Stipulated
Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and telephone
number] as my California agent for service of process in connection with this action or any
proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

[printed name]

Signature: _____

[signature]

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**ATTESTATION PURSUANT TO CIVIL L.R. 5-1(I) RE E-FILING ON BEHALF OF
MULTIPLE SIGNATORIES**

Pursuant to Civil Local Rule 5-1, I, Richard G. Frenkel, hereby attest concurrence in the filing of this document has been obtained from the signatory listed above.

Dated: April 8, 2014

By: /s/ Richard G. Frenkel
Richard G. Frenkel
LATHAM & WATKINS LLP
Counsel for WhatsApp Inc.